IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No. 1136

JENNIE HERZIG, as Administratrix of the goods, chattels and credits of Herman Weintraub, deceased,

Respondent,

against

SWIFT & Co.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, AND BRIEF IN SUPPORT THEREOF

HAROLD R. MEDINA,
Counsel for Petitioner.

GEORGE J. STACY,
JOSEPH KANE,
of Counsel.

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner was defendant in an action brought under Florida law to recover for death of Herman Weintraub through alleged negligence of defendant.

The action was brought in the New York Supreme Court, Kings County, and was removed to the United States District Court for the Eastern District of New York on the ground of diversity of citizenship. There was a verdict, after trial, for respondent for $20,000, which said District Court refused to set aside (R. pp. 279-281), and entered judgment on June 29, 1945, for $20,171.50 (R. p. 282). This was affirmed upon appeal by the United States Circuit Court of Appeals for the Second Circuit, which entered judgment of affirmance thereon on March 15, 1946 (R. p. 291). Petitioner now prays that a writ of certiorari issue directed to said Honorable United States Circuit Court of Appeals for the Second Circuit to review said judgment of affirmance.

Summary Statement of Matters Involved

This action was brought under the Florida statutes allowing a recovery in the event of death, under a provision whereby an action may be brought by an administrator where there are no dependents (R. p. 5). It is the well-settled Florida law that in such an action the recovery is to be the present value of deceased's future estate (his prospective future estate discounted to present value), and that plaintiff must affirmatively prove the value of such future estate by evidence of earnings and savings. Respondent pleaded this limitation of recovery in her complaint (R. pp. 5, 6). She further had a witness expert in the Florida law testify as to her right of action and said limitation thereon (R. p. 66; R. 1st trial, pp. 31-34, 39-42). This limitation was also charged by the District Court as being the measure of her damages (R. pp. 250, 251).

Deceased, after working at one occupation for twenty-five years (R. pp. 11, 25, 27), had savings of $2,000 (R. pp. 15, 16). His life expectancy was 25.99 years (R. p. 67), so that his future estate as shown by respondent's evidence was $2,000. This discounts at simple interest of 6% (the New York State legal rate) to a present value of $781.25. (The $2,000 in the hands of the administratrix form no part of the future estate as the administratrix already has it.) There could not properly be any finding of a present value of $20,000 which the jury awarded. Such a sum represents a future estate of $51,200 computed at the same New York State legal rate. The District Court refused to set aside this verdict (R. pp. 279-281) and entered judgment on it (R. p. 282).

The Circuit Court of Appeals in affirming the judgment held:

> "* * * the amount of the damage sustained was a question of fact not reviewable in this Court on appeal" (R. p. 290).

This, it is submitted, was erroneous.

This case does not involve a mere matter of excessiveness. The limitations imposed by Florida law and as pleaded by respondent and charged by the Trial Judge were clearly exceeded. The Circuit Court of Appeals had the power to examine and correct this and should have done so (*Reisberg* v. *Walters,* 111 F. [2d] 595, 597, 598 [C. C. A. 2]).

In a case where there is no dependency, such as in this case, the highest court of Florida has always refused to allow such a judgment to stand, because contrary to the law of Florida, although it has allowed reductions to $2,000, and in one case to $2,500, in order to terminate litigation. The Circuit Court of Appeals was bound to follow the interpretation put upon the Florida statute by the highest court in Florida (*Moore* v. *Atlantic Coast Line R.R. Co.* [C. C. A. 2], decided February 21, 1946).

Furthermore, there was a departure from the usual course of judicial proceedings by the District Court. This accident involved a collision between an auto and petitioner's truck. On which side the truck had fallen was a vital point. The District Judge stated that he took judicial notice that the truck had fallen on its left side (R. p. 91). This ruling likewise decided how the accident had occurred and whose witnesses were correct in their assertions.

There were also errors in the charge on the law as to contributory negligence and as to proximate cause which were not corrected.

It is petitioner's contention that the verdict was improper, that the Trial Judge should have set it aside and that judgment should not have been entered on it; that the Circuit Court of Appeals had power to examine the verdict and judgment as being clearly contrary to the law of Florida and should have done so in this case, especially where respondent pleads that very limitation as being her damages, the Court charged that limitation, and the limitation was clearly exceeded.

Reasons for Granting Writ

1. The Circuit Court of Appeals had the power to examine the verdict and judgment of the District Court and the amount thereof, which were contrary to the well-settled limitations of the Florida law, which limitations are pleaded by respondent as her damages and charged by the District Judge. The Trial Judge should have set it aside and judgment should not have been entered on it; and the Circuit Court of Appeals should have examined said verdict and judgment and reversed said judgment. Whether the Circuit Court of Appeals can and should reverse a judgment of a District Court which clearly exceeds in amount a definite limitation provided by law is a very important matter of frequent application.

2. The Circuit Court of Appeals has affirmed a judgment on an important question of local law (that of the State of Florida) in a way contrary to and in conflict with the applicable local decisions of the highest court of the State of Florida.

3. The Circuit Court of Appeals by its affirmance has sanctioned a departure from the usual course of judicial proceedings by the District Court.

4. The Circuit Court of Appeals erred in deciding that the error in the charge as to contributory negligence was corrected; and that there was no error as to proximate cause or that such error was corrected.

WHEREFORE petitioner respectfully prays that this petition be granted.

SWIFT & Co.,
Petitioner,
by HAROLD R. MEDINA,
Counsel.

New York, N. Y., April 5th, 1946.

Certificate

I hereby certify that I have examined the foregoing petition; that in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

HAROLD R. MEDINA,
Counsel,
165 Broadway,
New York, N. Y.

New York, April 15, 1946.